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Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001307-MR
AND
NO. 2017-CA-000294-MR

GARY S. VANDER BOEGH; MARK A. VANDER BOEGH; BRIAN VANDER BOEGH; KAREN SLOAN; LORI VANDER BOEGH; AND GLENN F. JONES

APPELLANTS

v.

APPEALS FROM MCCRACKEN CIRCUIT COURT
HONORABLE TIMOTHY KALTENBACH, JUDGE
ACTION NO. 10-CI-00634

BANK OF OKLAHOMA, N.A.

APPELLEE

OPINION
AFFIRMING IN PART, VACATING IN PART AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; MAZE AND K. THOMPSON, JUDGES.

THOMPSON, K., JUDGE: Gary S. Vander Boegh, Mark A. Vander Boegh, Brian Vander Boegh, Karen Sloan, Lori Vander Boegh and Glenn F. Jones (collectively

"the Vander Boeghs") appeal from the McCracken Circuit Court's July 2016 findings of fact, conclusions of law and final order and judgment dismissing their counterclaims and its January 2017 findings of fact, conclusions of law and order awarding costs and attorney fees. In 2016-CA-001307-MR, the Vander Boeghs argue the court erred by dismissing their counterclaims against the Bank of Oklahoma, N.A. ("the Bank") regarding its performance as trustee of two trusts in which the Vander Boeghs are minority beneficiaries. In 2017-CA-000294-MR, the Vander Boeghs argue the trial court erred by ordering them to pay approximately $2.7 million dollars in attorney fees and costs/expenses to the Bank. Though they have not been formally consolidated, we will resolve both related appeals in this combined opinion.[1] Having heard oral argument, and after having carefully considered the record and applicable law, we affirm the dismissal of the counterclaims but vacate and remand the attorney fee award.

This is not the first appeal regarding the administration of these trusts. In 2013, we affirmed the trial court's decision giving the Bank direction on how to proceed in the face of conflicting demands from beneficiaries. *Vander Boegh v.*

[1] To avoid making this lengthy opinion truly unmanageable, we will discuss only the most pertinent arguments and authority cited by the parties, though we have considered all their arguments. *See Meyers v. Chapman Printing Co., Inc.*, 840 S.W.2d 814, 817 (Ky. 1992) ("We have considered all of the issues (and subissues) presented but, to avoid unnecessarily extending this Opinion, we address only those that merit discussion.") In addition, this combined opinion renders moot the Vander Boeghs' request to stay resolution of case 2017-CA-000294-MR pending resolution of case 2016-CA-001307-MR.

Bank of Oklahoma, N.A., 394 S.W.3d 917 (Ky.App. 2013) (*Vander Boegh I*).[2] In *Vander Boegh I*, we set forth the relevant underlying facts and procedural history as follows:

> This appeal involves the Three Rivers limestone quarry, located in Livingston County, Kentucky. The Three Rivers is the sole asset of two separate trusts (*i.e.*, the "Charles R. Jones, Sr., inter Vivos Trust dated May 1, 1973," and the "Eula Kathleen Jones Testamentary Trust U/W/D October 24, 1967"), and it is subject to a ninety-nine-year lease agreement with Martin Marietta Materials, Inc. [LaFarge North America, Inc. subsequently acquired Martin Marietta's rights.] The total royalties paid (and later escrowed) by Martin Marietta between January 1995 and December 31, 2010, have totaled over $17,000,000. Sometime between January and March of 2010, the trusts received a report from an auditor they had hired to monitor Martin Marietta's performance of its lease obligations and quarrying activities at Three Rivers. The report indicated that between 1995 and 2010 Martin Marietta had incorrectly used a forty-five-ton downward adjustment to calculate several of the royalty payments it owed the trusts, resulting in an alleged shortfall estimated at $104,000.
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> The Vander Boeghs are beneficiaries holding collective minority interests (approximately 3/16ths) in both of the above-referenced trusts. After they were informed of the results of the audit, they demanded that the trustee of the trusts, [the Bank], refuse all future royalty payments from Martin Marietta and issue Martin Marietta a notice of default pursuant to the terms of the

[2] The trusts have also been the subject of litigation in federal court. *First Nat'l Bank & Trust Co. v. Martin Marietta Materials, Inc.*, 22 Fed. App'x 546 (6th Cir. 2001); *Anderson v. Old Nat'l Bancorp*, 675 F.Supp.2d 701 (W.D. Ky. 2009). The parties also mention that there has been, or still is, additional litigation.

> lease, which could potentially give the trusts the right to terminate the lease if Martin Marietta did not provide a timely cure. The Vander Boeghs further believed that Martin Marietta had committed other breaches of the lease which also required [the Bank] to send Martin Marietta a notice of default. Specifically, they suspected that Martin Marietta had underpaid royalties besides those identified in the audit and that Martin Marietta had committed a violation of its Three Rivers mining permit which, they asserted, amounted to a breach of the lease. They asserted that if [the Bank] failed to give Martin Marietta a notice of default under these circumstances, it could result in a waiver of these alleged breaches and, thus, could amount to a breach of the fiduciary duties that [the Bank] owed to the beneficiaries pursuant to the terms of the trusts.
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> [The Bank] did not send Martin Marietta any notice of default, but it began refusing royalty payments from Martin Marietta in April, [sic] 2010. Martin Marietta continued to make payments, but placed those payments in escrow. A few months later, other beneficiaries collectively holding the majority interests (approximately 13/16ths) in the respective trusts (the Armstrongs) requested that [the Bank] resume accepting royalty payments and continue refraining from issuing a notice of default to Martin Marietta. Because the Vander Boeghs' demands conflicted with those of the Armstrongs, [the Bank] filed the instant action in McCracken Circuit Court pursuant to Kentucky Revised Statutes (KRS) 386.675 for instruction regarding how to fulfill its fiduciary obligations to the beneficiaries pursuant to the terms of the trust instruments under the circumstances presented.

Vander Boegh I, 394 S.W.3d at 922-23 (footnote omitted).

The Vander Boeghs filed counterclaims against the Bank alleging it breached its fiduciary and/or contractual duties to the Vander Boeghs and/or had

negligently performed its duties as trustee. Some of the counterclaims alleged the Bank failed to comply with obligations it agreed to undertake in a letter of understanding executed prior to becoming trustee ("the Letter"), such as instituting an audit procedure of the quarry's operations. With the agreement of the parties, the trial court bifurcated the action and stayed the counterclaims until resolution of the Bank's declaratory judgment action.

As we related in *Vander Boegh I*, after a 2011 bench trial on the Bank's declaratory judgment action the trial court:

> entered a judgment declaring that under the terms of the trust instruments taken as a whole [the Bank] retained the power to exercise its discretion to not only refrain from issuing notices of default relating to the Martin Marietta lease, but to also resolve any monetary or non-monetary default without seeking to terminate the lease . . . .
>
> . . . .
>
> Applying its construction of the trust documents and the "prudent investor" standard against the evidence presented at trial, the circuit court found that under the circumstances it was reasonable and in the best interests of all the beneficiaries, and thus consistent with [the Bank's] fiduciary duties as trustee, for [the Bank] to keep the Martin Marietta lease in force in spite of Martin Marietta's alleged $104,000 royalty shortfall. To this effect, the circuit court noted that if the Martin Marietta lease were terminated, there was no certainty of finding another lessee capable of operating the Three Rivers Quarry at the current rate of production or willing to pay a higher royalty rate, and that the Vander Boeghs had produced no evidence to the contrary. It noted that many beneficiaries depended upon the limestone royalties and

would suffer financial hardship during the uncertain but likely lengthy period of time necessary to terminate the lease and find another lessee operator, when no royalties would be paid. It noted that the lease contained a "perimeter lands" provision that was unique to the quarrying industry and would almost certainly not be included in a lease with any other prospective lessee.[3] It noted that Martin Marietta had never conceded to committing any breach of the lease, the evidence to that effect was at best speculative, and, according to the available evidence and expert reports, there was a possibility that Martin Marietta had actually *overpaid* royalties to the trusts. Moreover, the circuit court noted that the royalty rates under the lease would be subject to renegotiation in 2013, that [the Bank] intended to seek an increase of the royalty rate at that time, and that [the Bank] had successfully increased the incentive royalty rate applicable to production over three million tons from 10 cents per ton to almost 42 cents per ton in 2007.

Furthermore, the circuit court instructed [the Bank] to resume accepting and distributing royalty payments in spite of the Vander Boeghs' demand for additional investigation regarding Martin Marietta's alleged mining permit violations and the total amount of Martin Marietta's alleged royalty shortage. In this vein, the circuit court noted that it had extended discovery to permit the Vander Boeghs an opportunity to substantiate that Martin Marietta had committed permit violations, or that $104,000 was not a reasonable estimate of Martin Marietta's alleged shortage, and that the Vander Boeghs had nevertheless failed to present evidence at trial sufficiently indicating that $104,000 was not a reasonable estimate of the total royalty shortfall due to Martin Marietta's forty-five-ton adjustment, or that any other royalty shortfalls had occurred or could be accurately

[3] The "perimeter lands" clause obligated Martin Marietta "to pay the trusts royalties for any limestone it produces and ships from properties lying within one mile of the trusts' properties"—even on land owned by others. *Id.* at 928, n. 4.

determined, or that Martin Marietta had engaged in any act amounting to a mining permit violation. Therefore, the circuit court concluded that to continue suspension of the royalty payments until such time as all [the Vander Boeghs'] questions involving Martin Marietta are fully investigated to their satisfaction is onerous and unsupported by credible evidence.

Consequently, the circuit court held that if [the Bank] pursued the course of action that it had originally proposed, [the Bank] would act consistently with its fiduciary duties as trustee despite the Vander Boeghs' contentions that doing so could be regarded as a waiver of what they believed were Martin Marietta's defaults. To that end, the circuit court's judgment provided:

> 1. Plaintiff, [the Bank], as Trustee, is instructed to receive, deposit, and distribute, in accordance with the terms of the Jones Family Trusts, all royalty payments from Martin Marietta from and after April, [sic] 2010 until and unless a contrary order of a court of competent jurisdiction directs otherwise.
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> 2. Plaintiff, [the Bank], as Trustee, is instructed to: (1) request that Martin Marietta pay $104,000.00 to the Jones family Trusts for the forty-five (45) ton adjustments made during the fifteen-year period between 1995 and 2010; (2) request that Martin Marietta pay royalties to the Jones Family Trusts, making no adjustments, in the future; (3) request that Martin Marietta maintain barge records for eighteen to twenty-four months; but (4) not attempt to terminate the Lease.
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> 3. Plaintiff, [the Bank], as Trustee, is instructed to use all remedies available in law and contained in the Lease, except termination of the lease, to resolve the forty-five (45) ton adjustment issue with Martin Marietta. [The Bank] is further

> instructed to compromise, settle, or abandon the claim if the costs of pursing [sic] the claim are greater than the likely return.

Id. at 926-29 (footnotes and quotation marks omitted). We affirmed, stressing that "the Vander Boeghs point to no evidence substantiating that the total damages relating to Martin Marietta's alleged royalty shortfall exceeded $104,000." *Id.* at 931.

The trial court then began proceedings on the Vander Boeghs' counterclaims, granting summary judgment to the Bank on some and scheduling a bench trial on the remainder. In July 2015, the Bank filed a motion for a pretrial conference, arguing among other things that the Vander Boeghs had alleged during discovery over fifty additional acts or omissions by the Bank without amending its pleadings to reflect what the Bank termed "additional counterclaims." The Vander Boeghs denied the additional alleged acts and omissions were new counterclaims, instead arguing they were only additional supporting facts and "[n]o new cause of action has been asserted."

The trial court ultimately permitted the Vander Boeghs to file an amended set of counterclaims, which they did in October 2015. Though the amended counterclaims did not contain such a demand, the Vander Boeghs contemporaneously filed a separate document demanding a jury trial. The Bank moved to strike the jury demand, arguing the Vander Boeghs had agreed to a bench

trial. The Bank asserted the amended counterclaims did not entitle the Vander Boeghs to a jury trial because they "are the same causes of action set forth in their original Counterclaim . . . ." And the Vander Boeghs then argued the amended counterclaims "are separate and distinct from the matters raised in the original Counterclaim . . . ."[4] After holding a hearing, the trial court granted the motion to strike the jury demand because the Vander Boeghs had waived their right to a jury trial and the "issues plead in the amended counterclaim fall within the same general area of dispute" as the original counterclaim. *See, e.g.,* 7 The late Kurt A. Phillips, Jr., David V. Kramer and David W. Burleigh, Ky. Prac. R. Civ. Proc. Ann. Rule 38.02 (2018) ("New issues sufficient to revive the right to a jury trial are not raised if the amended pleadings concern the same general area of dispute as were raised in the original pleadings.")

The court held a lengthy bench trial on the counterclaims in May 2016, and about two months later issued detailed findings of fact and conclusions of law. The court concluded the breach of contract and negligence claims failed because, other than inapplicable exceptions, beneficiaries of a trust may only bring equitable claims against a trustee. The court also found the Vander Boeghs "failed

[4] We decline to rule definitively on the parties' dispute about whether judicial estoppel bars either from switching positions. Both parties' positions did evolve but judicial estoppel generally bars a party from arguing a new position only if the party successfully persuaded a court to adopt its prior position. *Mefford v. Norton Hospitals, Inc.*, 507 S.W.3d 580, 584 (Ky.App. 2016). The court did not adopt the Bank's initial position.

to prove any basis upon which they are entitled to monetary damages or injunctive relief for breach of fiduciary duty." The Vander Boeghs then filed appeal 2016-CA-001307-MR.

Meanwhile, the Bank sought to recover its expenses, costs and attorney fees from the Vander Boeghs. The Bank's motion was based upon KRS 386B.10-040, which became effective in July 2014, after the counterclaim proceedings began. That statute, part of the Uniform Trust Code, provides:

> In a judicial proceeding involving the administration of a trust, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney's fees, to any party, to be paid by another party or from the trust that is the subject of the controversy.

The Bank attached voluminous, significantly redacted invoices to its motion. By way of illustrative example, an invoice requesting $165 for one hour of work performed on July 11, 2013, substantively only says: "Researched [redacted]." The Vander Boeghs vehemently opposed the Bank's motion, contending it would be improper to award fees based upon a statute which did not become effective until the case was in progress and the redactions made it difficult to determine if the fees, costs and expenses were reasonably incurred. The court ordered the Bank to file a privilege log, which it did. However, the log failed to provide clarity. For example, the log provides only as follows for the aforementioned July 11, 2013, entry: "Derek McMahan (SKO law clerk)

performed Legal Research[:] Attorney-client privilege (KRE [Kentucky Rules of Evidence] 503); [The nature of the research is protected by the] attorney work product doctrine[.]"

In January 2017, the trial court granted the Bank's motion for costs, expenses and fees, concluding without explanation that the privilege log "adequately document[ed] the time spent and fees charged for each task." The court concluded applying KRS 386B.10-040 was proper but deducted five percent from the lodestar figure because the Bank unnecessarily had three attorneys at trial and a deposition. The court ordered the Vander Boeghs to pay $2,206,644 in attorney fees and an additional $407,915 in costs and expenses.[5] After the trial court denied their motion to alter, amend or vacate, the Vander Boeghs filed appeal 2017-CA-000294.

The Vander Boeghs' first argument is that the trial court erred by striking their jury demand. The parties disagree about whether the Vander Boeghs' claims are equitable or legal, but we need not resolve that issue because we agree with the trial court that the Vander Boeghs waived any jury trial right they may have enjoyed.

[5] Better practice would likely have been for the court to delay ruling on the Bank's request for attorney fees and costs/expenses until all litigation on the merits had concluded, after which some privileges may no longer have been applicable.

The Vander Boeghs timely demanded a jury trial pursuant to Kentucky Rules of Civil Procedure (CR) 38.02, but they later expressly waived that demand by, among other things, agreeing to a bench trial during a September 2010 hearing. That waiver remained effective as to the original counterclaims, even after they filed amended pleadings, because amended pleadings "do[] not revive a right, previously waived, to demand jury trial on the issues already framed by the original pleadings." 7 Ky. Prac. R. Civ. Proc. Ann. Rule 38.02. *Accord Scudamore v. Horton*, 426 S.W.2d 142, 144 (Ky. 1968). The determination of whether the Vander Boeghs could have demanded a jury trial on only the new counterclaims depends on whether the new claims present "issues . . . fairly raised by the original pleadings." 7 Ky. Prac. R. Civ. Proc. Ann. Rule 38.02.

A party must demand a jury trial "of any issue triable of right by a jury . . . ." CR 38.02. Unfortunately, the parties have not cited, nor have we independently located, Kentucky precedent explaining what precisely constitutes an "issue" for purposes of interpreting CR 38.02. We, therefore, look to treatises and federal courts for guidance.

An amended pleading entitles a party to a jury trial upon proper demand "only with respect to the new issues raised in the amended pleadings." 7 Ky. Prac. R. Civ. Proc. Ann. Rule 38.02. And a new issue "means more than the presentation of a new legal theory of recovery. New issues sufficient to revive the

right to a jury trial are not raised if the amended pleadings concern the same general area of dispute as were raised in the original pleadings." *Id.*

We agree with the trial court that the amended counterclaims "concern the same general area of dispute" as did the original. First, the new counterclaims added no new parties to the action. As the United States Court of Appeals for the Second Circuit observed, "[w]hen the same parties are the litigants before and after an amended pleading, we are unlikely to find a new issue has been raised." *Westchester Day School v. Village of Mamaroneck*, 504 F.3d 338, 356 (2d Cir. 2007). Second, comparing the original counterclaims with the amended counterclaims shows that the amended pleading involves the same core issues[6] with only amplified factual allegations. "New facts that merely clarif[y] the same general issues raised in the original complaint do not create new issues of fact upon which to assert a jury demand." *LaMarca v. Turner*, 995 F.2d 1526, 1545 (11th Cir. 1993) (quotation marks and citation omitted). Or, in other words, "[a]mendments to pleadings thus may contain new facts which do not create new issues triable by a jury." *Id.*

[6] As the trial court cogently noted, the ultimate issues were always: "was [the Bank] negligent in the administration of its duties as trustee, did it breach its contract [i.e., the Letter] with the Vander Boeghs, and did it breach its fiduciary duty?"

In paragraph 32 of the original counterclaim, the Vander Boeghs listed multiple alleged acts or omissions by the Bank; the amended counterclaim re-avers those extant examples and adds many more. However, the core underlying issues regarding whether the Bank performed properly as trustee remained unchanged. A trial court possesses discretion to determine whether a waiver of a jury trial remains effective upon the filing of an amended pleading which does not raise new, material issues. We agree with the trial court that the amended counterclaims did not raise new issues and so the jury trial waiver applied to *all* the Vander Boeghs' counterclaims.

Having affirmed the trial court's decision to strike the Vander Boeghs' jury demand, we now address their contention that the court erred by dismissing their breach of contract and negligence claims. Claims for breach of contract are actions at law, 17B C.J.S. *Contracts* § 832 (2019), but a beneficiary's rights against a trustee are purely equitable (with exceptions not present here). *See* RESTATEMENT (THIRD) OF TRUSTS § 95. Therefore, as a matter of general principle a beneficiary may not maintain a breach of contract action against a trustee. *Jacob v. Davis*, 128 Md.App. 433, 738 A.2d 904, 922 (1999).

We are unpersuaded by the Vander Boeghs' argument that they should be able to maintain claims for breach of contract because the Bank agreed in the Letter, which the Vander Boeghs deem a contract, to perform certain tasks

once it became trustee. As the Bank notes, the Vander Boeghs' claims substantively stem from alleged acts or omissions which occurred after the Bank became the trustee. In fact, the obligations which the Bank agreed to undertake in the Letter involved how it would perform as trustee. In sum, we agree with the trial court that the Vander Boeghs could not maintain a breach of contract action against the Bank.[7]

Similarly, beneficiaries cannot raise negligence claims against trustees for alleged breaches of the trustee's fiduciary duties:

> The fact that beneficiaries predicate their breach of trust claim upon the trustee's alleged negligent performance of its fiduciary duties does not convert an action in equity into one cognizable in law. In such instances, negligence is in the case, but only as an element in the breach of fiduciary duties; *no common-law action in negligence is available to the beneficiaries.*

76 AM. JUR. 2D *Trusts* § 589 (2019) (emphasis added). *Mullikin v. Jewish Hosp. Ass'n of Louisville*, 348 S.W.2d 930 (Ky. 1961), relied upon by the Vander Boeghs, is readily distinguishable as that case did not involve claims made by beneficiaries against a trustee.

[7] Since the trial court unusually conducted a trial before dismissing the counterclaims for failure to state a viable claim for relief and did not exclude matters outside the pleadings, the court technically granted summary judgment under CR 56. *See* CR 12.02. However, any such technical distinctions make no true difference here since the outcome would be the same whether considered under Rule 12, Rule 56 or as a typical post-trial verdict.

Next, the Vander Boeghs argue the trial court erred by finding the Bank did not breach its fiduciary duty to keep the beneficiaries reasonably informed. There is no dispute the Bank owed such a duty to the beneficiaries. Indeed, that duty is statutorily mandated. Prior to its repeal in 2014, KRS 386.715 required a trustee to "keep the beneficiaries of the trust reasonably informed of the trust and its administration." (As quoted in *Jarvis v. National City*, 410 S.W.3d 148, 158 n.29 (Ky. 2013.)) Since 2014, KRS 386B.8-130(1)(a) has similarly required a trustee to "keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests."

Quoting commentary to RESTATEMENT (THIRD) OF TRUSTS § 83, the Kentucky Supreme Court held a trustee's duty to inform beneficiaries under KRS 386.715 "may be satisfied by relatively informal reports that reveal trust assets and liabilities, receipts and disbursements, and other transactions involving trust property, and that disclose the amounts and bases of compensation paid to the trustee(s) and any agent(s) during the accounting period covered by the report." *Jarvis*, 410 S.W.3d at 158. Given their similarity, we conclude the same standard applies to a trustee's duties under both statutes.

The trial court noted that the Bank held annual in-person meetings with the beneficiaries from 2006-2009 and, thereafter, sent monthly newsletters

and held teleconferences with them. The Vander Boeghs have not shown those findings to be erroneous. We affirm the trial court's conclusion that the Bank fulfilled its less than onerous duty to keep the beneficiaries informed.[8]

Relatedly, the Vander Boeghs argue the Bank failed to fulfill its duty to inform because it knowingly provided incorrect information. As we construe it, the Vander Boeghs' contention is based upon the Bank having told the beneficiaries that the quarry's operations were being audited when instead the Bank had engaged a CPA to perform a "review of procedures."

First, we note that the Vander Boeghs have not shown any demonstrable prejudice from the Bank employing a CPA firm to engage in a review of procedures instead of an audit. Second, the CPA hired by the Bank testified he told the Bank that a review of procedures, not an audit, was the appropriate method to determine if the trusts were receiving their proper royalties. Indeed, even the Vander Boeghs' accounting expert testified that the methodology

[8] The Vander Boeghs criticize the Bank for not giving the beneficiaries prior notice of an extraordinary fee of over $100,000 as compensation for time spent preparing for arbitration proceedings against Martin Marietta. But the Bank sent the beneficiaries a letter in February 2009 explaining that it would be seeking the fees and the trial court found the billed expense reasonable as the arbitration resulted in the collection of over $4,000,000 in royalties (a conclusion the Vander Boeghs have not shown to be erroneous). Although better practice would have been for the Bank and the trustees to have agreed beforehand on a rate of compensation, as the Letter required, the Vander Boeghs have not shown a cognizable breach of the Bank's fiduciary duties because they cannot show any injuries stemming from the fees in question since it is reasonable to spend about $100,000 vigorously preparing for a proceeding which led to a roughly $4,000,000 gain.

used by the CPA appeared designed to meet the objectives of the review, and that performing an audit would not have permitted a reviewer to determine if the reported tonnage shipped from the quarry was accurate.[9] Third, the Bank provided the beneficiaries with the CPA's letters of engagement, correspondence and reports. Thus, though the Bank should not have used the term "audit" in communications with the beneficiaries,[10] we affirm since the review of procedures methodology used by the CPA adequately satisfied the main objective of having an independent review of the tonnage shipped from the quarry.

The Vander Boeghs next contend the trial court erred by finding the Bank did not breach its duties to oversee the quarry operator's lease compliance and production records. Indeed, the Vander Boeghs contend there are "[u]ndisputed facts in the trial record" showing the Bank breached its duties. However, much of this argument is really an unsuccessful reiteration of the Vander Boeghs' previous, unavailing arguments.[11]

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[9] The attorney who drafted the Letter on behalf of the beneficiaries testified that its reference to requiring an "audit procedure" be performed was intended to verify that the royalties paid to the trusts were based upon the amount of limestone shipped from the quarry since some beneficiaries believed limestone had been given away or otherwise inadequately documented.

[10] The Bank employee who used the term audit in communications with the beneficiaries testified that he was not an accountant and so he did not understand, or intend to use, the specialized term "audit" as it is used in the accounting field.

[11] We decline the Vander Boeghs' invitation to take judicial notice of documents from Lafarge created after this appeal was filed which purportedly show that it had incorrectly paid royalties. The discrepancy in royalties was apparently discovered by the CPA hired by the Bank, which strengthens the Bank's argument that utilizing a review of procedures methodology was

The Vander Boeghs' final argument in case 2016-CA-001307-MR is that the Bank breached its fiduciary duties by failing to pursue vigorously alleged lease violations. According to the Vander Boeghs, lease breaches and/or threats to terminate the lease could have been used to get Martin Marietta to pay a higher royalty rate. Notably, the Vander Boeghs do not cite to any precedent, other than our opinion in *Vander Boegh I*, to buttress their speculative assertions. Moreover, some of the alleged conduct which the Vander Boeghs classify as lease violations, such as placing mining waste into a pit, were found by the trial court to not violate the lease (a conclusion the Vander Boeghs have not shown to be erroneous).

The trial court listed several reasons why declaring a default and attempting to terminate the lease would not have been in the best interests of the beneficiaries, such as the uncertainty of obtaining an alternate quarry operator, the loss of income during any period when the quarry was idle and the uncertainty of including a perimeter lands clause in a new lease. Though Lafarge did replace Martin Marietta, the Vander Boeghs have not shown how the trial court's basic conclusions were incorrect or unreasonable. Perhaps another trustee would have

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appropriate. Regardless, we may only take judicial notice of matters not subject to reasonable dispute. *Clay v. Commonwealth*, 291 S.W.3d 210, 217 (Ky. 2008). The documents at issue do not so qualify, as the parties' disagreements about them show. Moreover, we generally may not consider evidence not presented to the trial court. *Oakley v. Oakley*, 391 S.W.3d 377, 380 (Ky.App. 2012).

declared lease violations and begun termination proceedings, but the Vander Boeghs have not shown the Bank breached its fiduciary duties by not so acting.

We now turn our attention to case 2017-CA-000294-MR. Initially, the Vander Boeghs argue the trial court awarded attorney fees to punish them, which they construe as being an infringement upon their right to seek judicial redress. Indeed, the trial court did note, among other things, that the Vander Boeghs "have litigated these issues since 1998" and their request to terminate the lease was "[a]gainst [the Bank's] best judgment and the wishes of the majority of the beneficiaries . . . ." But the trial court did not restrict the Vander Boeghs' access to the courts. They have not shown how they were prevented from raising their claims—indeed, the trial court addressed each of their counterclaims. We reject any contention that, pursuant to an agreement, awarding attorney fees to a victorious litigant after the conclusion of a protracted and bitterly fought case violates the losing litigant's right to access the courts.

We also reject the Vander Boeghs' argument that the trial court awarded attorney fees as punishment. First, they have pointed to no material factual mistakes in the trial court's recitation of the lengthy history of litigation involving the trusts. Second, a court should consider, among other things, the hours reasonably spent by counsel in making an attorney fee determination. *See Meyers*, 840 S.W.2d at 826. And the determination of whether counsel's claimed

hours were reasonably spent is dependent in part upon the complexity and length of the litigation. In other words, the trial court did not err in recounting the case's remarkable history. Subjective claims that persecution lies behind facially neutral orders is not sufficient to warrant relief.

Turning to more substantive matters, the Vander Boeghs argue the trial court erred by retroactively applying an attorney fee statute which became effective during the pendency of the counterclaim proceedings. Generally, we agree that mid-litigation changes in the law should not be permitted to materially alter a party's expectations and obligations. However, sometimes a statute may properly be applied to extant litigation. *See, e.g.*, *Spurlin v. Adkins*, 940 S.W.2d 900, 901 (Ky. 1997) ("Nonetheless, legislation has been applied to causes of action which arose before its effective date, in the absence of an express declaration that the provision is to be so applied, in those instances where the courts have determined that the provision was remedial or procedural in nature and that retroactive application of the provision was consistent with the legislative intent."). This is such a situation.

We review issues involving statutory construction *de novo*. *Cumberland Valley Contractors, Inc. v. Bell County Coal Corp.*, 238 S.W.3d 644, 647 (Ky. 2007). The cardinal rule we must follow in construing statutes is to ascertain the intent of the legislature and to then give effect to its intent. *MPM*

Financial Group Inc. v. Morton, 289 S.W.3d 193, 197 (Ky. 2009). The General Assembly's clear intent was for the provisions of the Uniform Trust Code to apply to cases already pending before its enactment "unless the court finds that application of a particular provision of this chapter would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties . . . ." KRS 386B.11-040(1)(c).

Under Kentucky precedent, statutes which authorize an attorney fee award are deemed remedial and thus applicable to pending cases. In *Central Kentucky Production Credit Ass'n v. Smith*, 633 S.W.2d 64 (Ky. 1982), the court applied a statute permitting enforcement of an agreement to pay attorney fees in debt collection proceedings to an agreement entered into before the statute's enactment. The court quoted a treatise favorably for the conclusion that "statutes either increasing or decreasing allowable costs, including attorneys' fees, are consistently applied to litigation pending when such statutes become effective, unless a contrary intent clearly appears from the statute." *Id.* at 66 (quotation marks and citation omitted).[12]

[12] The fact that Kentucky views statutes authorizing attorney fees as remedial, not penal, materially distinguishes this case from *McCabe v. Duran*, 180 P.3d 1098 (Kan.Ct.App. 2008), heavily relied upon by the Vander Boeghs. In fact, *McCabe* did not even involve attorney fees but instead involved whether a statute allowing for double damages to be awarded when a trustee embezzles or knowingly converts trust property for its own usage should be applied to a trustee's acts taken prior to the statute's adoption.

Because the attorney fee statute at issue here is remedial, *McCabe* is inapplicable and the Vander Boeghs' related constitutional arguments are unavailing. KRS 386B.10-040 is

Applying the attorney fee statute in the Uniform Trust Code to extant cases comports with the conclusions reached by other courts. For example, classifying an argument functionally the same as that made by the Vander Boeghs as "faulty[,]" the Arkansas Court of Appeals held as follows:

> It is clear that the General Assembly intended that attorney's fees may be awarded in cases involving trusts created before September 1, 2005, and litigation initiated before that date, unless the trial court made a finding justifying its refusal to award them. The trial court made no such finding here. Additionally, we note that attorney's fees statutes are procedural in nature and instantly applicable to existing causes of action.

Young v. Young, 2008 WL 5176763, at *8 (Ark.Ct.App. Dec. 10, 2008) (unpublished).[13] An appellate court in Oklahoma came to the same basic conclusion in *Atwood v. Atwood*, 25 P.3d 936, 948-49 (Okla.Civ.App. 2001).

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constitutional as it is a procedural statute rationally related to the legitimate legislative purpose of ensuring a party is made whole if victorious in litigation regarding a trust. In addition, though the Vander Boeghs may have expected at the time they filed their counterclaims to be shielded from paying the Bank's attorney fees, they have not shown they had a legally protected, readily cognizable, vested right in such protection. *Dean v. Gregory*, 318 S.W.2d 549, 552 (Ky. 1958) (holding that a party does not have a vested right in a particular procedural remedy). In fact, the constitutional limitations against retroactive legislation are only "modest." *King v. Campbell County*, 217 S.W.3d 862, 869 (Ky.App. 2006) (quoting *Landgraf v. USI Film Products*, 511 U.S. 244, 272, 114 S. Ct. 1483, 1501, 128 L.Ed.2d 229 (1994)).

[13] Though *Young* oddly was rendered as an unpublished opinion, it is directly on point and its application here is more relevant than normal because the General Assembly stated in KRS 386B.11-010 that "[i]n applying and construing the Uniform Trust Code, as enacted in this chapter, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it."

Here, the trial court determined the statute should apply because it did not substantially interfere with the conduct of the litigation or prejudice the parties' rights. As the trial court correctly noted, the Vander Boeghs had actual and constructive knowledge when the statute took effect that the Bank would seek to recover its attorney fees under KRS 386B.10-040. Nonetheless, the Vander Boeghs persisted in vigorously prosecuting their counterclaims, and even amended them after the statute became effective. The Vander Boeghs certainly had the right to do so, but they acted with the attendant risk of potentially being liable for the Bank's attorney fees. In other words, they had an opportunity to refine or amend their conduct to avoid the application of the statute. In short, they have not shown how applying the statute had a meaningful impact on their litigation conduct or strategy.[14] Likewise, and for the same core reasons, the trial court did not err in concluding application of the statute did not materially prejudice the Vander Boeghs.[15]

Having determined that the trial court had the authority to award fees, we now turn our attention to the amount of fees awarded. Our close review of the

[14] The Vander Boeghs' argument that they could not have simply dismissed their counterclaims once the statute became effective is technically correct as dismissal after the Bank filed its responsive pleading would have required the Bank and/or trial court's agreement. CR 41.01. But it is specious for the Vander Boeghs to argue that they could not readily have gotten the necessary consent.

[15] Similarly, we reject the Vander Boeghs' argument that justice and equity do not support an award of attorney fees.

billing invoices and privilege log submitted by the Bank leads to the conclusion that the award must be vacated and remanded.

"Where an attorney fee is authorized by statute, the reasonableness of the claimed fee is for the trial court to determine, subject only to abuse of discretion." *Young v. Vista Homes, Inc.*, 243 S.W.3d 352, 367 (Ky.App. 2007). "[T]he attorney's fee awarded should consist of the product of counsel's reasonable hours, multiplied by a reasonable hourly rate, which provides a 'lodestar' figure, which may then be adjusted to account for various special factors in the litigation." *Meyers*, 840 S.W.2d at 826.

The Bank was completely victorious on the Vander Boeghs' counterclaims, whose complexity and length necessitated the expenditure of a significant amount of time and resources. By all indications, the Bank's counsel rendered excellent performance in defense of the Bank. However, an attorney fee award cannot merely be a casual approval of the invoices submitted by the successful party's counsel. Instead, a court must closely scrutinize any request for fees to ensure all claimed hours, costs and expenses were *reasonably* incurred.[16]

To determine whether claimed time was reasonably spent, a reviewing court must know why the time was spent. And, that is where the problems in this

[16] The Vander Boeghs have not challenged the hourly rates charged by the Bank's counsel, so we do not address that matter.

award lie—the invoices submitted by the Bank contain so many redactions that it is impossible to determine if many of the claimed time expenditures were reasonable.

The invoices are hundreds of pages long, so we cannot discuss them in minute detail. However, solely by way of illustrative example, Page 6791 of the record contains ten itemizations of time spent by the Bank's counsel, six of which contain redactions (i.e., blackened out portions). Five of those six redactions are so significant as to leave a reader at a loss as to why the claimed time was spent. To wit, those five redacted submissions are:

> 3/14/13 JWB Phone conference with Anthony Phelps re: [Redacted] 0.30 [hours] $130.50
>
> 3/15/13 JWB Phone conference with Chris Rooker, Tori Nicholson, Anthony Phelps, A.J. Singleton re: [Redacted] 1.00 [hours] $435.00
>
> 04/08/13 AJS Communicate with A. Phelps re: [Redacted] 0.10 [hours] $33.50
>
> 04/15/13 AJS Communicate with C. Rooker re: [Redacted] 0.10 [hours] $33.50
>
> 04/15/13 JWB Email from Chris Rooker re: [Redacted] 0.30 [hours] $130.50

When the Vander Boeghs argued they could not meaningfully respond to the attorney fee motion, the Bank contended the redacted information was privileged. And so the trial court ordered the Bank to file a privilege log, which is one permissible way to address such situations. *Collins v. Braden*, 384 S.W.3d

154, 164 (Ky. 2012).[17] However, merely tendering a privilege log is not sufficient. Instead, a privilege log should be "detailed" and contain "descriptions of the documents sufficient to establish the existence of the privilege (i.e., more than their titles)." *Id*. A party claiming application of a privilege "must provide the court with sufficient information to show the existence of the elements of the privilege and to allow review of that decision by higher courts." *Id.* at 164-165.

Unfortunately, the Bank's tendered privilege log is fatally generic and terse. Using the same five illustrative examples previously discussed, the Bank's privilege log provides:

> 3/14/13 John Bilby (SKO attorney) communication with Anthony Phelps (SKO attorney) regarding Legal Research[.] [Thus, the communication is protected by] Attorney-client privilege (KRE [Kentucky Rules of Evidence] 503; attorney work product doctrine[.]
>
> 3/15/13 John Bilby (SKO attorney) communication with Chris Rooker (BOK), Victoria Nicholson (BOK), Anthony Phelps (SKO attorney) and A.J. Singleton (SKO attorney) regarding Litigation Strategy[.] [Thus, the communication is protected by] Attorney-client privilege (KRE 503); attorney work product doctrine[.]
>
> 4/8/13 A.J. Singleton (SKO attorney) communication with Anthony Phelps (SKO attorney) regarding Dispositive Motions[.] [Thus, the communication is protected by] Attorney-client privilege (KRE 503); attorney work product doctrine[.]

[17] Though *Collins* involved discovery disputes, its logic is equally applicable to this attorney fee dispute.

> 4/15/13 A.J. Singleton (SKO attorney) communication with Chris Rooker (BOK) regarding Dispositive Motions[.] [Thus, the communication is protected by] Attorney-client privilege (KRE 503); attorney work product doctrine[.]
>
> 4/15/13 Chris Rooker (BOK) communication with John Bilby (SKO attorney) regarding Dispositive Motions[.] [Thus, the communication is protected by] Attorney-client privilege (KRE 503); attorney work product doctrine[.]

The burden of proving a privilege applies rests with the party claiming it—here, the Bank. *Collins*, 384 S.W.3d at 161. Determining whether a privilege applies is a mixed question of fact and law which appellate courts review *de novo*. *Id.* And, a court must have enough information to determine if a document is privileged because not all communications with a client are protected. *Commonwealth, Cabinet for Health and Family Services v. Scorsone*, 251 S.W.3d 328, 330 (Ky.App. 2008).

The privilege log added minimal additional information. Simply saying an attorney had a conversation about a general topic, such as litigation strategy, and then asserting it is privileged and writing no additional details is insufficient. Instead, our Supreme Court has emphasized that "if a privilege log is to have any use, the descriptions of the documents must be specific enough to aid the court in determining whether the documents are privileged." *General Motors*

Corp. v. Chauvin, 2004-SC-000338-MR, 2005 WL 119747, at *6 (Ky. Jan. 20, 2005) (unpublished).[18]

Simply put, neither we nor the trial court have enough information to determine if the invoices are privileged, especially since the merits stage of the litigation has concluded. Perhaps they are, in whole or part. *See*, *e.g.*, *Hewes v. Langston*, 853 So.2d 1237, 1248-49 (Miss. 2003) (holding that detailed client billing records may be covered by the attorney-client privilege and/or work product doctrine). But without more information, a conclusion either way would be merely guesswork. Indeed, the Bank's submissions are so terse that it is difficult at times to determine whether its counsel billed for time spent researching the claimed privileges themselves. Therefore, the trial court abused its discretion when it held that it had sufficient information to make a specific attorney fee award.

To avoid potentially privileged information from being disclosed to the Vander Boeghs, on remand the Bank shall submit unredacted copies of the invoices to the trial court for its *in camera* review. *Collins*, 384 S.W.3d at 164 ("Parties asserting privileges have numerous ways to establish the existence of the attorney-client privilege when an opposing party challenges its existence. One common method is an *in camera* review by the trial court of the documents in

[18] Under CR 76.28(4)(c), citation to an unpublished opinion is proper if no published opinion "adequately address[es] the issue before the court." We conclude the Kentucky Supreme Court's guidance on the necessity for specific, detailed privilege logs satisfies that criterion.

question." (paragraph break omitted)). Thereafter, the trial court must issue a properly informed attorney fee award.

In conclusion, we agree with the Vander Boeghs that the claimed attorney fees seem excessive. The Bank's attorneys submitted invoices for things like conversations between its attorneys regarding seemingly settled topics. However, we express no binding opinion on the matter since we cannot examine the unredacted invoices. We also decline to mandate that the Bank's attorney fee award be roughly equal to the amount of attorney fees incurred by the Vander Boeghs, or to otherwise cap the award. Instead, we only require a thorough *in camera* review, followed by a detailed written award using the familiar lodestar procedure outlined in *Meyers.* We also decline to require an evidentiary hearing on the fee question, as that determination is within the trial court's inherent discretion.

For the foregoing reasons, the McCracken Circuit Court is affirmed in case 2016-CA-001307-MR and is affirmed in part and vacated in part and remanded for further proceedings consistent with this opinion in case 2017-CA-000294-MR.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

Mick G. Harrison
Bloomington, Indiana

Mark S. Medlin
La Center, Kentucky

ORAL ARGUMENT FOR APPELLANTS:

Mick G. Harrison
Bloomington, Indiana

BRIEFS FOR APPELLEE:

Anthony J. Phelps
Lexington, Kentucky

Shannon A. Singleton
Lexington, Kentucky

John W. Bilby
Louisville, Kentucky

ORAL ARGUMENT FOR APPELLEE:

John W. Bilby
Louisville, Kentucky